LIBRARY
SUPREME COURT

Office-Supreme Court, U.S.
FILED
OCT 14 1965
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 670

TECON ENGINEERS, INC., ET AL.,
Petitioners

v.

THE UNITED STATES OF AMERICA
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

WILLIAM C. BATTLE
Court Square Building
Charlottesville, Virginia
Counsel for Petitioners

Of Counsel:

JAMES E. FAHEY
1000 Kentucky Home Life Building
Louisville, Kentucky

INDEX

	PAGE
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statute Involved	2
Statement of the Case	3
Reasons for Granting the Writ	4
1. The Judgment of the Court of Claims Is in Conflict with the Decisions of this Court	4
2. The Judgment of the Court of Claims Is in Conflict with Prior Decisions of the Court of Claims	6
3. The Case Involves an Important Question Affecting the Jurisdiction of the Court of Claims Which Should Be Resolved by this Court	9
4. The Judgment of the Court of Claims so Far Departs from the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of this Court's Power of Supervision	9
Conclusion	10
Appendix A—Court of Claims Opinion	11
Appendix B—Court of Claims Judgment	26
Appendix C—Order of District Court	29
Appendix D—Court of Claims Opinion in *Hobbs v. United States*, No. 244-63, December 11, 1964	30
Appendix E—Department of Justice Letter to Court of Claims dated January 29, 1965	33

CITATIONS

Cases

PAGE

Brinker-Johnson Co. v. United States, 144 Ct. Cl. 489 (1959) 6, 8

British American Tobacco Co. v. United States, 89 Ct. Cl. 438, *cert. denied*, 310 U.S. 627 (1940) 6, 7

Corona Coal Co. v. United States, 263 U.S. 537 (1924) 4, 5, 6, 9

Ex Parte Skinner & Eddy Corp., 265 U.S. 86 (1924) 4, 5, 6, 8, 9

Hobbs v. United States, No. 244-63, Ct. Cl., December 11, 1964 ..... 6, 7

Lockerty v. Phillips, 319 U.S. 182 (1943) 9

Maguire Indus., Inc. v. United States, 114 Ct. Cl. 687, 86 F. Supp. 905 (1949), *cert. denied*, 340 U.S. 809 (1951) 6, 7

Matson Nav. Co. v. United States, 352 U.S. (1932) 9

National Cored Forgings Co. v. United States, 132 Ct. Cl. 11, 132 F. Supp. 454 (1955) 6, 8

Soriano v. United States, 352 U.S. 270 (1957) 9

Statutes

28 U.S.C. §1255(1) (1958) 2

28 U.S.C. §1491 (1958) 3

28 U.S.C. §1500 (1958) 2, 3, 4, 7, 8, 9

Ch. 231, §154, 36 Stat. 1138 (1911) 4, 5

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965

No. .....

TECON ENGINEERS, INC.,
CAPITAL ENGINEERING SERVICES, INC.,
BRIGHTON ENGINEERING COMPANY, and
WILLIAM H. and BETSY S. MAY,

Petitioners

v.

THE UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above cases on February 10, 1965.

Opinion Below

The opinion of the United States Court of Claims is reported at 343 F.2d 943. Its text is printed as Appendix A *infra* at 11.

Jurisdiction

The judgment of the United States Court of Claims was entered on February 10, 1965 and a copy thereof is printed as Appendix B *infra* at 26. Petitioners' motion for rehearing timely made was denied on July 16, 1965.

The jurisdiction of this Court is invoked under 28 U.S.C. §1255(1) (1958).

Questions Presented

1. Does Section 1500 of Title 28, United States Code (1958), deprive the United States Court of Claims of jurisdiction of a suit if a similar suit between the same parties and involving the same subject matter is pending in an appropriate federal district court?

2. Did the United States Court of Claims, having decided the above question in the negative, commit an abuse of its discretion in dismissing Petitioners' suits with prejudice, thereby forever depriving them of the right to prosecute their claims to final judgment?

Statute Involved

Section 1500 of Title 28, United States Code (1958) provides:

> *Pendency of Claims in Other Courts.*
>
> The Court of Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

Statement of the Case

In late 1962 and early 1963, Petitioners filed five separate suits against the United States in the Court of Claims under 28 U.S.C. §1491 (1958) to recover federal income taxes and penalties alleged to have been erroneously collected from them. The United States answered denying the Petitioners' rights to recover. In May, 1963, the five actions were consolidated for trial by agreement of the parties. A sixth suit involving a subsequent taxable year for one of the Petitioners was filed in February, 1964 and, in March, 1964, was consolidated with the other suits. The total amount in controversy exceeded $500,000.00.

The cases were scheduled for trial on February 1, 1965. On January 14, 1965, the trial commissioner denied Petitioners' request for a postponement of the trial and his order was affirmed upon review by the Court. Petitioners, on January 26, 1965, commenced suits on the same claims in the United States District Court for the Eastern District of Kentucky and then moved the Court of Claims to dismiss the suits pending in that Court for lack of jurisdiction under 28 U.S.C. §1500 (1958) or, in the alternative, to dismiss the suits without prejudice.

The United States opposed Petitioners' motion to dismiss, briefs were filed, and the Court ordered oral arguments which were presented February 7, 1965. On February 10, 1965, Petitioners' motion to dismiss was denied and the Court, having been previously advised that Petitioners would stand on their motion, entered judgment dismissing the cases with prejudice for failure to prosecute.

On February 19, 1965, the United States District Court for the Eastern District of Kentucky, holding that

it was bound by the jurisdictional determination of the Court of Claims, dismissed the Petitioners' suits. The order of the district court is printed as Appendix C *infra* at 29. This decision is now on appeal to the United States Circuit Court of Appeals for the Sixth Circuit.

The Court of Claims followed its order of dismissal with an opinion on April 16, 1965 and denied Petitioners' motion for rehearing on July 16, 1965.

Reasons for Granting the Writ

1. The decision of the Court below on the jurisdictional question is in direct conflict with this Court's decisions in *Ex Parte Skinner & Eddy Corp.*, 265 U.S. 86 (1924), and *Corona Coal Co. v. United States*, 263 U.S. 537 (1924). This conflict is patently apparent from the holdings made in the cases cited and in the instant case upon virtually identical jurisdictional facts. In each case the significant events occurred in the following order: (1) exercise of jurisdiction by the Court of Claims, (2) commencement of a suit upon the same claims in another court, and (3) demand for dismissal of the Court of Claims suits or of an appeal therefrom. In the cases cited, this Court held that the commencement of a similar suit in another court deprived the Court of Claims of jurisdiction. In the case at bar the Court of Claims held, in direct conflict with this Court, that the commencement of a similar suit in another Court did not deprive the Court of Claims of jurisdiction.

This Court in the two decisions cited above held that dismissal for want of jurisdiction over the subject matter was the clear command of Section 154 of the Judicial Code, ch. 231, §154, 36 Stat. 1138 (1911), the predecessor of Section 1500 of Title 28, United States Code (1958). In *Ex Parte Skinner & Eddy Corp., supra,* this

Court considered whether the Court of Claims could resume jurisdiction over an action it thought erroneously dismissed when a state court proceeding had been commenced during the interval between dismissal and resumption. After pointing out the almost absolute right of plaintiff to dismiss his action voluntarily prior to judgment, this Court emphasized a "special reason" for denying retention of jurisdiction by the Court of Claims, namely, "the restrictive provisions of section 154, which, by reason of the Washington [State] suit, intervene and apply." 265 U.S. 86, 95. This Court, under the circumstances, concluded that:

> It would be a useless waste of time and effort to enforce a trial in the Court of Claims, if we were, upon appeal, to find that plaintiff was unjustly deprived of his substantial right to dismiss his petition, as we should have to do for the reasons stated.

Id. at 96. In *Corona Coal Co. v. United States, supra,* this Court upholding the Government's position in the case dismissed an appeal from a Court of Claims decision on the ground that the plaintiff subsequently had commenced a suit on the same claim in a federal district court, thereby depriving the Court of Claims of jurisdiction. Despite hardship to the plaintiff and obvious duplication of proceedings already conducted in the Court of Claims, this Court emphasized:

> It is urged, however, that the [district court] actions were brought *ex necessitate rei,* because they were about to become barred by expiration of the statutory period of limitation, and that, for this and other reasons, the case is not within the spirit of Section 154, properly construed. But the words of the statute are plain, with nothing in the context to make

their meaning doubtful; no room is left for construction, and we are not at liberty to add an exception in order to remove apparent hardship in particular cases.

263 U.S. 537, 540.

Confronted with a similar sequence of operative facts in the case at bar, the Court below refused to apply the statute according to its unequivocal language as held proper by this Court in the above decisions. Notwithstanding the obvious conflict in holdings, the decisions of this Court outlined above were accorded only summary treatment in footnotes of the opinion. Appendix A at 24.

The present case, from any analysis of the operative facts, is on all fours with the same legal question presented in *Corona Coal Company v. United States, supra,* and *Ex Parte Skinner & Eddy Corp., supra;* yet the Court below seeks a different construction of the statute to reach a different legal result. It is submitted that this Court cannot permit the conflict to stand.

2. The holding of the Court below conflicts directly with its own holdings in *Hobbs v. United States,* No. 244-63, Ct. Cl., December 11, 1964 (opinion printed as Appendix D *infra* at 30), decided only two months before the decision in the present case, *Brinker-Johnson Co. v. United States,* 144 Ct. Cl. 489 (1959), *National Cored Forgings Co. v. United States,* 132 Ct. Cl. 11, 132 F. Supp. 454 (1955), *Maguire Indus., Inc. v. United States,* 114 Ct. Cl. 687, 86 F. Supp. 905 (1949), *cert. denied,* 340 U.S. 809 (1951), and *British American Tobacco Co. v. United States,* 89 Ct. Cl. 438, *cert. denied,* 310 U.S. 627 (1940). In each of the cited cases, Section 1500 and its predecessor deprived the Court of Claims of jurisdiction upon operative facts identical to those of the present case.

In the recent *Hobbs* decision, the jurisdictional facts were on all fours with the facts of the case at bar, namely, a suit in the Court of Claims followed by commencement of a suit in another court on the same claim. Relying solely on Section 1500 of Title 28, United States Code (1958), the Court of Claims stated:

> According to the undisputed facts disclosed by the pleadings, the terms of this statute clearly deprive this court of jurisdiction.

Appendix D *infra* at 31.

In *Maguire Indus., Inc. v. United States, supra,* plaintiff filed a petition in the Tax Court of the United States requesting redetermination of a government contract controversy. When the Tax Court held that it had no jurisdiction and dismissed, plaintiff filed a petition in the Court of Claims. Plaintiff later appealed the Tax Court's dismissal and the Government immediately challenged the jurisdiction of the Court of Claims. Though plaintiff contended that the Tax Court was not a court within the meaning of Section 1500, the Court of Claims in dismissing for want of jurisdiction considered the question immaterial for its decision because the later proceedings in the appellate court constituted a suit upon the same claim and for that reason alone the Court of Claims was deprived of jurisdiction.

In *British American Tobacco Co. v. United States, supra,* plaintiff filed two suits on the same day, one in the Court of Claims and one in a federal district court on the same claim. Plaintiff was dismissed in the district court, apparently on the merits, and then attempted to prosecute its pending Court of Claims action. The Court of Claims in dismissing for lack of jurisdiction recognized that the statute prohibited not only the *filing* of a suit in

the Court of Claims, but also the *prosecution* of such a suit even though already filed.

In *National Cored Forgings Co. v. United States, supra,* where plaintiff similarly had filed two suits on the same day, the Court of Claims permitted a complete trial on the merits. Then it reconsidered its ruling on the Government's jurisdictional objection based upon Section 1500 and dismissed because "by the express terms of this section, this court is deprived of jurisdiction . . . ." 132 Ct. Cl. 11, 18, 132 F. Supp. 454, 458. It is important to note that in its opinion here the Court of Claims found *Ex Parte Skinner & Eddy Corp.,* 265 U.S. 86 (1924), controlling.

In *Brinker-Johnson Co. v. United States, supra,* plaintiff sued first in the Court of Claims and obtained a judgment. This Court reversed. Plaintiff then attempted to amend its petition in the Court of Claims to state a theory of recovery allegedly left open by this Court's decision. The Court of Claims found, however, that plaintiff now had another suit pending on appeal in the United States Court of Appeals for the Ninth Circuit. As the claim in that suit was the same as the one offered as an amendment, the Court of Claims held that Section 1500 deprived it of jurisdiction and dismissed.

An anomalous situation is created by the holding of the present case. Section 1500 consistently has deprived the Court of Claims of jurisdiction at whatever stage of the Court of Claims proceeding it first appeared that another suit was pending. It has never been necessary heretofore to determine precedence in time as a jurisdictional fact. On the contrary, Section 1500 as demonstrated above has been applied even when it clearly appeared that the Court of Claims proceeding was first in time. It is submitted that the abrupt departure in the present case from the unbroken line of cases applying Section 1500 and

predecessors inevitably will produce a state of argumentative discord among the Court of Claims and other inferior federal courts which this Court should now resolve.

3. Clearly the question presented here is of urgent importance. It involves a departure by the Court of Claims from the decisions of the United States Supreme Court and from its own decisions on the construction of a jurisdictional statute. In essence it represents the expansion by the Court of Claims of its own jurisdiction.

It is for Congress alone to distribute the judicial power to inferior federal courts. *E.g., Lockerty v. Phillips,* 319 U.S. 182, 187-88 (1943). The United States Supreme Court has repeatedly protected this Congressional prerogative by insuring that federal courts exercise neither more nor less authority than Congress by statute has extended. This is especially true in the case of decisions by the Court of Claims where this Court's review is the sole restraint. See, *e.g., Soriano v. United States,* 352 U.S. 270 (1957); *Matson Nav. Co. v. United States,* 284 U.S. 352 (1932); *Ex Parte Skinner & Eddy Corp.,* 265 U.S. 86 (1924); *Corona Coal Co. v. United States,* 263 U.S. 537 (1924). It is submitted that the prevention of usurpation of judicial power is a compelling reason for review of the present case.

4. Assuming the Court of Claims correctly decided that it retained jurisdiction notwithstanding Section 1500, its refusal to grant Petitioners' motion to dismiss without prejudice constituted an abuse of discretion which so far departs from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision. Relying on the unbroken line of cases outlined above holding that Section 1500 deprives the Court of Claims of jurisdiction, Petitioners elected with confidence to stand on their motion to dismiss. That

this reliance was justified is amply demonstrated by the fact that at the same time in another proceeding then pending in the Court of Claims the Government had taken a position identical to Petitioners' position in this case. Thereafter the Government abruptly receded from its position in the other case and opposed Petitioners' position here. See Letter from Louis F. Oberdorfer to Frank T. Peartree, January 29, 1965, printed as Appendix E *infra* at 33. The single effect of the abrupt changes of position by the Government and by the Court of Claims respecting the proper construction of Section 1500 is to forfeit forever the Petitioners' refund claims of more than $500,000.00. The minimum demanded by fair administration of justice under circumstances evidencing such an extreme change of position was a dismissal without prejudice or, in the alternative, dismissal with prejudice, saving the Petitioners' right to reinstitute the cases should this Court deny certiorari, or upon granting certiorari, affirm the judgment.

Conclusion

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

William C. Battle
Attorney for Petitioners

Of Counsel:
James E. Fahey

APPENDIX A

In the United States Court of Claims

Nos. 354-62; 26-64; 355-62; 115-63; 356-62 and 114-63
(Decided April 16, 1965)

TECON ENGINEERS, INC., A CORPORATION AND RELATED CASES v. THE UNITED STATES

James E. Fahey and *Clarence I. Kipps, Jr.* for plaintiffs.

S. Laurence Shaiman, with whom was *Acting Assistant Attorney General John B. Jones, Jr.,* for defendant. *C. Moxley Featherston* and *Philip R. Miller* were on the brief.

Before COWEN, *Chief Judge,* LARAMORE, DURFEE, DAVIS and COLLINS, *Judges.*

ON PLAINTIFFS' MOTION TO DISMISS THEIR PETITIONS FOR LACK OF JURISDICTION

DURFEE, *Judge,* delivered the opinion of the court:

This opinion follows prior disposition of the case when, on February 10, 1965, the court, by order, denied plaintiffs' motion to dismiss their petitions for lack of jurisdiction, and further directed an opinion to follow. In disposing of plaintiffs' motion, the court found as follows:

(1) on May 21, 1963, the five actions were, by agree-

ment of the parties, consolidated for trial and, thereafter, both plaintiffs and defendant filed various motions for the production and inspection of documents, for taking discovery depositions, and for other purposes, and both participated in discovery proceedings and in several pretrial conferences;

(2) on May 18, 1964, after the trial commissioner had postponed several previous settings for trial, he entered an order setting these cases for trial in Louisville, Kentucky, beginning February 1, 1965;

(3) on January 14, 1965 the trial commissioner denied plaintiffs' request for a postponement of the trial for 60 days after February 1, 1965, and on review this order was affirmed January 26, 1965;

(4) on January 26, 1965, plaintiffs filed in the United States District Court for the Eastern District of Kentucky complaints upon the same claims which are included in the petitions in this court, and on the same date plaintiffs filed their motion to dismiss their petitions, asserting that under 28 U.S.C. §1500, this court lacks jurisdiction;

(5) before they filed the complaints in the District Court, plaintiffs had elected to institute and prosecute these actions in this court, and until January 26, 1965, when plaintiffs filed their motion to dismiss, the claims upon which plaintiffs' petitions are based were not pending in any other court.

The court further found that:

(1) on January 27, 1965, plaintiffs notified the trial commissioner that they had elected to stand on their motion to dismiss for lack of jurisdiction and would not go to trial;

(2) in their request for oral argument on their motion to dismiss, as well as during the argument in open court,

plaintiffs stated that they had notified the trial commissioner that they would not go to trial if their motion to dismiss was denied and further stated that "If the court denies the plaintiffs' motion, the case will be dismissed with prejudice for failure of the plaintiffs to proceed to trial or further prosecute their cases in this court. The plaintiffs are so certain that the court no longer has jurisdiction in these cases, and that this position will ultimately be upheld, that they accept the risk of the alternative result of a dismissal of their claims with prejudice"; and

(3) plaintiffs' statements constitute a refusal to further prosecute these actions.[1]

The question presented is whether plaintiffs by this motion may oust this court of its conceded jurisdiction under the Tucker Act over these pending suits by later filing new suits for the same claims in a Federal district court, and then moving to dismiss these same cases here, for lack of jurisdiction.

The jurisdictional statutes directly involved are:

28 U.S.C. (1958 ed.):

---

[1] Plaintiffs first invoked the jurisdiction of this court with the filing of a petition on December 14, 1962, for the recovery of Federal income taxes and civil fraud penalties alleged to have been erroneously collected from plaintiffs. On May 20, 1963, following a motion by plaintiffs to take depositions, plaintiffs agreed to consolidate these six actions for trial. Thereafter, plaintiffs have, by over 30 separate procedural steps, including stipulations of fact, motions for discovery, participation in pretrial conferences, taking of depositions, motions for reconsideration of the trial commissioner's orders, motions for extension of time on precedure, objections to defendant's motions and other actions extending for a period of over two years, re-asserted their recognition of the jurisdiction of this court. While we do not consider or rely upon this protracted and persistent participation in trial procedure before this court by plaintiffs as determinative of the legal question before us, it is illustrative of the procedural problems and delay that can result.

Sec. 1346 [as amended by Sec. 80 of the Act of May 24, 1949, c. 1939, 63 Stat. 101, and Sec. 1 of the Act of July 30, 1954, c. 648, 68 Stat. 589].

United States as defendant.

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

* * * * *

§ 1500. *Pendency of claims in other courts.*

The Court of Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

The reasons why plaintiffs invoke Sec. 1500 are irrelevant for the purpose of deciding their motion. They have clearly stated in their petition to dismiss and in oral argument, that if their motion to dismiss their petitions for lack of jurisdiction is denied, they would not go to trial or further prosecute their claims in this court, and would accept the risk of the alternative result of a dismissal of their claims with prejudice.

The jurisdiction of this court over suits for refund of Federal taxes is established by Section 1 of the Tucker

Act of March 3, 1887 (c. 359), 24 Stat. 505, now 28 U.S.C. § 1491 (1958 ed.).

Original and concurrent jurisdiction was given to the District Courts by amendment to the Tucker Act, as stated by the Supreme Court in *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 565 (1962), in these words:

> In truth the District Courts have long been vested with substantial portions of the identical jurisdiction exercised by the Court of Claims. The Tucker Act, § 2, 24 Stat. 505 (1887), as amended, 28 U.S.C. § 1346(a)(2), gives them concurrent jurisdiction over the suits it authorizes, when the amount in controversy is less than $10,000. Under that Act a District Court sits "as a court of claims," *United States* v. *Sherwood*, 312 U.S. 584, 591, and affords the same rights and privileges to suitors against the United States. *Bates Manufacturing Co.* v. *United States*, 303 U.S. 567, 571. * * *

In *Bates Mfg. Co.* v. *United States*, 303 U.S. 567, 571 (1938), a tax refund suit in District Court, the Supreme Court pointed out that the Tucker Act gave the District Courts and the Court of Claims *equal status* as to suits for refund of taxes over which concurrent jurisdiction was given, and that under the Tucker Act Congress created:

> * * * an integrated jurisdictional plan by which the Court of Claims and District Courts could afford equal opportunities for expeditious and fair trials of like claims within the jurisdictional amount of the District Courts. * * * Uniformity and equality in substantial rights and privileges—for claimants in both forums—were essential features in the system. * * * As to substantial rights, Congress evidently meant to give claimants an identical status in both

Courts where the amount in controversy was included in the jurisdiction of both. * * *

Accordingly, the law is clearly established that the District Courts and the Court of Claims have concurrent jurisdiction over suits for refund of taxes under the Tucker Act, and that in the exercise of this concurrent jurisdiction, the District Courts and the Court of Claims have *equal status.*

Plaintiffs concede that they must elect between suit in the Court of Claims and suit in another court of concurrent jurisdiction. However, they contend that under Section 1500, this court has no present jurisdiction because they have *later* elected to bring suit in another court; further, that the statute does *not* provide, as the Government now asserts, that the Court of Claims can keep jurisdiction if suit was filed in the Court of Claims first. This contention is not valid for several reasons.

First, there is no requirement for express provision in the statute that this court can keep jurisdiction if suit was filed here first.[2]

The long established rule of comity in such cases is that the court having equal and concurrent jurisdiction over the subject matter which first obtains and exercises this jurisdiction, retains jurisdiction until a final judgment is entered. *Covell* v. *Heyman,* 111 U.S. 176, 182 (1884); *Ponzi* v. *Fessenden et al.,* 258 U.S. 254 (1922); *Smith* v. *M'Iver,* 9 Wheat. (6 U.S.) 532 (1824); *Speed Products Co.* v. *Tinnerman Products,* 171 F. 2d, 727 (C.A.D.C. 1948); *Triangle Conduit & Cable Co.* v. *National Electric Products Corp.,* 125 F. 2d 1008 (3d Cir. 1942) *cert. denied* 316 U.S. 676 (1942); *Cresta Blanca Wine Co.* v. *Eastern Wine Corporation,* 143 F. 2d, 1012 (2d Cir.

[2] In these cases over two years before the filing in the District Court.

1944); *Ohio Steel Foundry Co.* v. *United States*, 69 Ct. Cl. 158 (1930).

This clearly recognized rule of comity has not been abrogated or repealed by any language in Section 1500. To interpret the statute in the manner urged by plaintiffs would be to attribute to Congress an intention, not only to deprive this court of its established jurisdiction over pending tax refund cases, but in the process, to interfere with the orderly administration of justice as long recognized and required by the rule of comity.

The legislative history of this court and specifically the history of Section 1500 is devoid of even any intimation of such an intent by Congress. Section 1500 in essence provides that the Court of Claims *"shall not have jurisdiction of any claim* for or in respect of which plaintiff or his assignee *has pending in any other court* any suit or process against the United States or any person" who has acted for the United States. We do not construe this language to provide for a disruption of this court's lawful jurisdiction by the mere filing of a petition in the District Court on the same claim that is then actually pending here. The words "shall not have jurisdiction" pertain solely to the acquiring or taking of jurisdiction by this court when the same plaintiff *already* "has pending in any other court" another suit on the same claim. Not only is the legislative history of Section 1500 devoid of any intimation to the contrary; its legal evolution in the Congress supports our conclusion.

From the date of the creation of the Court of Claims by the Act of February 24, 1855, until the Act of March 17, 1866, which gave an appeal to the Supreme Court from judgments of the Court of Claims, the Congress was largely intent upon establishing this court as an independent judicial tribunal with increased powers for the adjudication of claims against the United States, free

from revisory authority on the part of the executive and legislative branches of the Government. This grant of judicial power did not, however, operate to deprive claimants of their existing common law rights to sue *officers of the United States* in other courts, and many of these same claimants also took advantage of the opportunity to sue on the same cause of action against *the United States* itself.

In order to prevent this growing conflict of jurisdiction or duplication of legal remedy, Congress adopted the Act of June 25, 1868 (15 Stat. 75). The purpose of Section 8 of the Act was explained to the Senate by the author of the bill, Senator Edmunds, as follows (81 Cong. Globe, 40th Cong. 2nd Sess., at 2769):

> The object of this amendment is to put to their election that large class of persons having cotton claims particularly, who have sued the Secretary of the Treasury and the other agents of the Government in more than a hundred suits that are now pending, scattered over the country here and there, and who are here at the same time endeavoring to prosecute their claims, and have filed them in the Court of Claims, so that after they put the Government to the expense of beating them once in a court of law they can turn around and try the whole question in the Court of Claims. The object is to put that class of persons to their election either to leave the Court of Claims or to leave the other courts. I am sure everybody will agree to that.

The bill, as thus offered by the Senator, was enacted into law *with one important deletion,* as shown by comparing the context of the proposed bill with the Act as actually adopted:

Original Bill (81 Cong. Globe p. 2769)	(Act of June 25, 1868) (15 Stat. 75)
SEC. 8. And it be further enacted, That no person shall file or prosecute any claim or suit in the Court of Claims, or an appeal therefrom, for or in respect to which he or any assignee of his shall have commenced and has pending, *or shall commence and have pending,* any suit or process in any other court against any officer or person who, at the time the cause as above alleged in such suit or process arose, was in respect thereto acting or professing to act, mediately or immediately, under the authority of the United States, unless such suit or process, if now pending in such other court, shall be withdrawn or dismissed within thirty days next after the passage of this act. (Italics supplied as to language deleted from the Act as adopted).	SEC. 8. *And be it further enacted,* That no person shall file or prosecute any claim or suit in the court of claims, or an appeal therefrom, for or in respect to which he or any assignee of his shall have commenced and has pending any suit or process in any other court against any officer or person who, at the time of the cause of action alleged in such suit or process arose, was in respect thereto acting or professing to act, mediately or immediately, under the authority of the United States, unless such suit or process, if now pending in such other court, shall be withdrawn or dismissed within thirty days after the passage of this act.

While no discussion of the reasons for the deletion of the words "or shall commence and have pending" from the bill as applied to a suit in another court, we must conclude that this deletion by Congress was not inadvertent. Congress clearly intended that if a claimant "shall have commenced and has pending" a suit in another court against any officer of the United States, the Court of Claims was to be divested of jurisdiction over the same claim when brought against the United States if the claim was filed *thereafter* in this court. Equally compelling is the conclusion that Congress intentionally deleted the very language from the Act of 1868 that plaintiffs would now have us read into Section 1500 for this sole purpose. The statute of 1868 was enacted to eliminate duplication of litigation between claimants and the Government or its agents, and to prevent conflicts of jurisdiction between

the Court of Claims and other courts. Section 1500 was enacted with the same basic legislative purpose.

In 1874, Congress undertook to consolidate and condense all the then scattered laws of the United States into a single volume, the Revised Statutes of 1874. Section 1067 of the Revised Statutes did change the phraseology of Section 8 of the Act of June 25, 1868, as follows:

Act of June 25, 1868	*Revised Statutes*
SEC. 8. *And be it further enacted,* That no person shall file or prosecute any claim or suit in the court of claims, or an appeal therefrom, for or in respect to which he or any assignee of his *shall have commenced and has pending any suit* or process in any other court against any officer or person who, at the time of the cause of action alleged in such suit or process arose, was in respect thereto acting or professing to act, mediately or immediately, under the authority of the United States, unless such suit or process, if now pending in such other court, shall be withdrawn or dismissed within thirty days after the passage of this act. (Italics supplied.)	SEC. 1067. No person shall file or prosecute in the Court of Claims, or in the Supreme Court an appeal therefrom, any claim for or in respect to which he or any assignee of his *has pending* in any other court any suit or process against any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, mediately or immediately, under the authority of the United States. (Italics supplied.)

However, there is no evidence of any intention of Congress in 1874 to change the real meaning of Section 8 of the Act of 1868. On the contrary, Congressman Butler, in explaining the purpose of the 1874 Revised Statutes, stated:

> We have not attempted to change the law, in a single word or letter, so as to make a different reading or different sense. All that has been done is to strike out the obsolete parts and to condense and consolidate and bring together statutes in *pari materia;* so that you have here, except insofar as it is human

to err, the laws of the United States under which we now live.

(Remarks of Representative Butler, 2 Cong. Record, 43d Cong. 1st sess. p. 129).

The minor change in phraseology from "shall have commenced and has pending" any suit in any other court, as stated in Sec. 8 of the Act of 1868 to the words "has pending in any other court" in the Revised Statutes of 1874, when considered with the clear expression of intent in revision "not * * * to change the law" does not evidence any change in the intent of Congress.

Section 1067 of the Revised Statutes of 1874 was adopted without change by Section 154 of the review and codification of the Judicial Code in 1911 (March 3, 1911, c. 231, 36 Stat. 1138, Sec. 154).

Section 1500 of the present Judicial Code changed the phraseology of Section 154 of the Judicial Code of 1911 as follows:

SEC. 154. No person shall file or prosecute in the Court of Claims, or in the Supreme Court on appeal therefrom, any claim for or in respect to which he or any assignee of his *has pending* in any other court any suit or process against any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, mediately or immediately, under the authority of the United States. (Italics supplied.)	§ 1500. *Pendency of claims in other courts.* The Court of Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee *has pending* in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States. (Italics supplied.)

As explained by the Revisor's notes which accompanied the Committee Report, the change of language in Section 1500 was to omit from the former statute the words "or in the Supreme Court on appeal therefrom" as unnecessary. The Revisor merely noted that other changes

were made in phraseology. Although the addition of the United States as a party defendant was a substantive change in the statute, this does not change its legal effect on the question now before us.

From this review of the legislative history of Section 1500, we conclude that there is no evidence of any intent of Congress at any time to change the legal effect of the original Section 8 of the Act of June 25, 1868. The clear meaning and legislative intent of this 1868 Statute was to prevent this court from taking jurisdiction of a claim *only* when the same plaintiff already "shall have commenced and has pending" another suit on the same claim in another court. This same clear meaning and intent is still evident in Section 1500, despite minor changes in phraseology which do not effect any change in jurisdiction.

We can find no reason to ascribe to Congress in its adoption of Section 1500 an intent to disrupt the rule of comity and equal status which the Congress has so long and clearly recognized in establishing the jurisdiction of the Court of Claims and other courts in tax cases. On the contrary, we conclude that the only reasonable interpretation of the statute is that it serves to deprive this court of jurisdiction of any claim for or in respect to which plaintiff has pending in any other court any suit against the United States, *only* when the suit shall have been commenced in the other court *before* the claim was filed in this court.

An opposite conclusion could lead to results far more excessive in delay and expense of fruitless litigation before this court than are those to which we have alluded in this case. For example, a plaintiff might carry his claim for tax refund in this court through trial to a Trial Commissioner's findings and opinion, then through oral

argument before the court and then, becoming suddenly apprehensive about the outcome or perhaps even after an adverse judgment, say to this court, "Let's call the whole thing off" by merely filing an identical petition in the District Court. Such a *"reductio ad absurdum"* could never have been intended by Congress in the enactment of Section 1500. This court cannot permit control of its jurisdiction and administration of its functions at the mere whim of a litigant.

Illustrative of this judicial recognition of the meaning of this statute under established rules of concurrent jurisdiction and comity between courts is the order just entered on February 19, 1965, by the United States District Court for the Eastern District of Kentucky on this same cause of action in *Tecon Engineers, Inc.* v. *United States of America.* The order recites that:

> This court has original jurisdiction concurrent with the jurisdiction of the United States Court of Claims over all the questions presented by the record in this case. 28 USCA 1346(a)(1). Prior to January 26, 1965 (the date on which this action was filed in this court) the plaintiff filed an action in the United States Court of Claims involving the same questions and asking the identical relief set forth in this proceeding, thereby electing to institute and prosecute its action in that court as provided by the statute.
>
> The United States Court of Claims accepted the jurisdiction of the action and on February 10, 1965 entered an order that the plaintiff's petition be dismissed with prejudice, thereby fully adjudicating the claims of the plaintiff in this case.
>
> It is ordered that this case be dismissed at the cost of the plaintiff.

The cases cited by plaintiffs (and the other relevant cases) are not particularly germane to our resolution of the correct interpretation of Section 1500, with respect to the facts of this case. For the most part the cases involve situations where suit was filed in another court prior to,[3] or simultaneous with,[4] the filing of the petition in this court. The other situations are where suit was filed in another court after this court relinquished jurisdiction,[5] or involved the appellate jurisdiction of the Supreme Court.[6] To the extent any of the cases lend themselves as support for plaintiffs' contention that subsequent filing of a similar action in another court ousts this court of jurisdiction, there is no indication that the issue of priority was ever fully briefed, considered or decided.[7] With this background, we cannot draw upon the prior case law for direction in this decision.

In plaintiffs' Request for Oral Argument on Jurisdictional Question, the following statements were made:

> The plaintiffs notified the Commissioner of this Court and Government counsel, by letter hand delivered on January 27, 1965, that the plaintiffs have

---

[3] *Los Angeles Shipbuilding & Drydock Corp.* v. *United States,* 138 Ct. Cl. 648; 152 F. Supp. 236 (1957); *Wessel, Duval & Co., Inc.* v. *United States,* 129 Ct. Cl. 464; 124 F. Supp. 636 (1954); *Joyce* v. *United States,* 98 Ct. Cl. 427; 48 F. Supp. 520 (1943); in *Maguire* v. *United States,* 114 Ct. Cl. 687; 86 F. Supp. 905 (1949); *cert. denied* 340 U.S. 809, the Tax Court litigation antedated suit in this court.

[4] *National Cored Forgings Co., Inc.* v. *United States,* 132 Ct. Cl. 11; 132 F. Supp. 454 (1955); *British American Tobacco Co., Ltd.* v. *United States,* 89 Ct. Cl. 438 (1939); *cert. denied* 310 U.S. 627; also see *Hobbs* v. *United States,* No. 244-63, Ct. Cl., December 11, 1964, which suit in the Fifth Circuit was filed one day after the petition was filed in this court.

[5] *Ex Parte Skinner & Eddy Corp.,* 265 U.S. 86 (1924).

[6] *Corona Coal Co.* v. *United States,* 263 U.S. 537 (1924).

[7] See *Hobbs* v. *United States, supra;* see particularly the briefs in the Supreme Court in *Corona Coal Co.* v. *United States, supra.*

elected to stand on their motion to dismiss for lack of jurisdiction and that they will not go to trial. We add here the specific statement that the plaintiffs will not further prosecute their cases in this Court.

Under these circumstances, there is adequate time for hearing oral argument and rendering a decision on the plaintiffs' jurisdictional motion since there is no necessity for a trial on February 1, 1965. If the Court grants the plaintiffs' motion, there should not be, and should not have been, any such trial. If the Court denies the plaintiffs' motion, the case will be dismissed with prejudice for failure of the plaintiffs to proceed to trial or further prosecute their cases in this Court. The plaintiffs are so certain that the Court no longer has jurisdiction in these cases, and that this position will ultimately be upheld, that they accept the risk of the alternative result of a dismissal of their claims with prejudice.

Failure to prosecute is ground for dismissal of a petition with prejudice under Rule 67(b) of this court. Accordingly, we hold that we have jurisdiction of these cases, and direct that plaintiffs' motion to dismiss their petitions for lack of jurisdiction be denied, and that these cases be dismissed with prejudice, in accordance with the order of this court dated February 10, 1965.

APPENDIX B

In the United States Court of Claims

TECON ENGINEERS, INC.
No. 354-62

TECON ENGINEERS, INC.
No. 26-64

CAPITAL ENGINEERING SERVICES, INC.
No. 355-62

BRIGHTON ENGINEERING COMPANY
No. 115-63

WILLIAM H. AND BETSY S. MAY
No. 356-62

WILLIAM H. AND BETSY S. MAY
No. 114-63
v.
THE UNITED STATES

ORDER

These cases come before the court on plaintiffs' motion to dismiss their petitions for lack of jurisdiction. Upon consideration thereof, together with plaintiffs' supplemental brief in support of the motion and defendant's brief in opposition, and after hearing oral argument, the court finds:

(1) on May 21, 1963, the five actions were, by agreement of the parties, consolidated for trial and, thereafter, both plaintiffs and defendant filed various motions for the production and inspection of documents, for taking discovery depositions, and for other purposes, and both par-

ticipated in discovery proceedings and in several pre-trial conferences;

(2) on May 18, 1964, after the trial commissioner had postponed several previous settings for trial, he entered an order setting these cases for trial in Louisville, Kentucky, beginning February 1, 1965;

(3) on January 14, 1965, the trial commissioner denied plaintiffs' request for a postponement of the trial for 60 days after February 1, 1965, and on review this order was affirmed January 26, 1965;

(4) on January 26, 1965, plaintiffs filed in the United States District Court for the Eastern District of Kentucky complaints upon the same claims which are included in the petitions in this court, and on the same date plaintiffs filed their motion to dismiss their petitions, asserting that under 28 U.S.C. 1500, this court lacks jurisdiction;

(5) before they filed the complaints in the District Court, plaintiffs had elected to institute and prosecute these actions in this court and until January 26, 1965, when plaintiffs filed their motion to dismiss, the claims upon which plaintiffs' petitions are based were not pending in any other court.

IT IS THEREFORE ORDERED that plaintiffs' motion to dismiss their petitions for lack of jurisdiction be denied.

The court further finds that:

(1) on January 27, 1965, plaintiffs notified the trial commissioner that they had elected to stand on their motion to dismiss for lack of jurisdiction and would not go to trial;

(2) in their request for oral argument on their motion to dismiss, as well as during the argument in open court, plaintiffs stated that they had notified the trial commissioner that they would not go to trial if their motion to dismiss was denied and further stated that "If the court

denies the plaintiffs' motion, the case will be dismissed with prejudice for failure of the plaintiffs to proceed to trial or further prosecute their cases in this Court. The plaintiffs are so certain that the Court no longer has jurisdiction in these cases, and that this position will ultimately be upheld, that they accept the risk of the alternative result of a dismissal of their claims with prejudice"; and

(3) plaintiffs' statements constitute a refusal to further prosecute these actions.

THEREFORE, IT IS FURTHER ORDERED that plaintiffs' petitions be dismissed with prejudice; and

IT IS FURTHER ORDERED that the court issue an opinion in these cases and that the time within which plaintiffs may file a motion for rehearing or a petition for certiorari shall not begin to run until the date of the court's opinion herein.

BY THE COURT
Chief Judge

Feb. 10, 1965

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT

No. 253*

TECON ENGINEERS, INC., *Plaintiff*

v.

UNITED STATES OF AMERICA, *Defendant*

ORDER

This court has original jurisdiction concurrent with the jurisdiction of the United States Court of Claims over all the questions presented by the record in this case. 28 USCA 1346 (a) (1). Prior to January 26, 1965 (the date on which this action was filed in this court) the plaintiff filed an action in the United States Court of Claims involving the same questions and asking the identical relief set forth in this proceeding, thereby electing to institute and prosecute its action in that court as provided by the statute.

The United States Court of Claims accepted the jurisdiction of the action and on February 10, 1965 entered an order that the plaintiff's petition be dismissed with prejudice, thereby fully adjudicating the claims of the plaintiff in this case.

It is ordered that this case be dismissed at the cost of the plaintiff.

February 19, 1965 — MAC SWINFORD, *Judge*

A True Copy Attest
Davis T. McGarvey, Clerk
U. S. District Court
By Helen M. Jennings
D. C.

---

*Note: Identical orders were entered in the Petitioners' other cases numbered 254 through 257.

APPENDIX D

In the United States Court of Claims

No. 244-63

(Decided December 11, 1964)

JAMES C. HOBBS v. THE UNITED STATES

H. Struve Hensel for the plaintiff.

William W. Fleming, with whom was *Assistant Attorney General John W. Douglas,* for the defendant. *Joseph F. Hennessey, Sidney G. Kingsley, Roland A. Anderson* and *John A. Horan* were on the brief.

Before COWEN, *Chief Judge,* LARAMORE, DURFEE and DAVIS, *Judges,* and JONES, *Senior Judge.*

ON DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S PETITION

PER CURIAM: This is a suit against the United States for alleged "taking and use" of plaintiff's two valve inventions covered by U.S. Patents No. 2,520,364 and No. 2,617,621, and for alleged restriction of the rights of plaintiff under these two patents pursuant to section 11 of the Atomic Energy Act of 1946 (60 Stat. 755). Jurisdiction of this court is invoked under section 13(a) of the Atomic Energy Act of 1946 and 28 U.S.C. §§ 1491 and 1498. The case is before us on defendant's motion to dismiss the petition for lack of jurisdiction.

The following facts appear from the record and may be taken as true for the purposes of this motion. Plaintiff invented two valve constructions for which he received the two patents mentioned above, issued in 1950 and 1952, respectively. He alleges that defendant used these inventions in the production of fissionable material. On October 9, 1956, plaintiff filed a claim with the Atomic Energy Commission for just compensation for the "taking and use" of plaintiff's inventions, and for the restriction of plaintiff's patent rights. The Patent Compensation Board of the Atomic Energy Commission denied plaintiff's claim by an order dated February 18, 1963. Thereafter, plaintiff filed its petition in this court on August 29, 1963. As a precautionary measure, in case section 189 of the Atomic Energy Act of 1954 (68 Stat. 919) should control as to procedure, plaintiff filed a petition to review the AEC order in the Fifth Circuit Court of Appeals on August 30, 1963; which petition is still pending in that court.

Defendant has shown, and plaintiff does not deny, that the petition pending in the Fifth Circuit Court of Appeals pertains to the same claim as the petition in this court. The Government, therefore, moves to dismiss the petition for lack of jurisdiction on the basis, *inter alia*, of the provisions of 28 U.S.C. §1500.

Section 1500 of Title 28, United States Code, provides in pertinent part:

> The Court of Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States * * *.

According to the undisputed facts disclosed by the pleadings, the terms of this statute clearly deprive this court of jurisdiction. Counsel for the Government stated during

oral argument that defendant is ready to proceed with the case pending in the Fifth Circuit. In these circumstances, we grant the Government's motion to dismiss.

The defendant's motion is granted, and plaintiff's petition is dismissed without prejudice.

APPENDIX E

January 29, 1965

LFO:LMT:SLShaiman:dms
154-192-61
154-354-62

Honorable Frank T. Peartree
Clerk
United States Court of Claims
1325 K Street, N.W.
Washington, D.C. 20005

Re: Frank Camero, Inc. v. United States,
Ct. Cl. No. 192-61
Tecon Engineers, Inc. v. United States,
Ct. Cl. No. 354-62 (and 5 related cases)

Dear Mr. Peartree:

In preparing the motion in opposition to the plaintiff's motion to dismiss without prejudice in Tecon Engineers, Inc. v. United States, captioned above, it appears that there is some inconsistency between the positions of the United States in that case and its position in Frank Camero v. United States with respect to the priority of proceeding in the Court of Claims. In the interpretation of 28 U.S.C., Section 1500, please be advised that to the extent that the Department's position may be inconsistent, the position stated in the memorandum filed this date in the Tecon case will prevail and the Department will recede from the position taken in Frank Camero v. United States on this issue.

We should appreciate your bringing this information to the attention of the Court. By copy of this letter we

are advising counsel for the plaintiffs in the above-entitled cases of this position.

Sincerely yours,

LOUIS F. OBERDORFER
Assistant Attorney General
Tax Division

By:
LYLE N. TURNER
Chief, Court of Claims Section

cc: Edwin J. McDermott, Esquire*
1901 Three Penn Center Plaza
Philadelphia 2, Pennsylvania

*Note: Edwin J. McDermott was counsel of record in the Court of Claims for the plaintiff in Frank Camero v. United States.